

TO BE PUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

COMMUNITY VOICE LINE, LLC, a
Maryland Limited Liability Company,

Plaintiff,

vs.

GREAT LAKES COMMUNICATION
CORP., an Iowa Corporation,

Defendant.

No. C12-4048-MWB

ORDER

This case is before me on plaintiff's motion for sanctions (Doc. No. 73) against defendant based on its alleged failure to comply with my discovery order (Doc. No. 64) of January 10, 2013. Defendant has filed a resistance (Doc. No. 76) and plaintiff has filed a reply (Doc. No. 80). I conducted a hearing on June 6, 2013. Daniel Hartnett, David Sellman and Tammy Cohen appeared for plaintiff. Anthony Osborn appeared for defendant. I directed defendant to file additional materials after the hearing, which it did on June 17, 2013. I then permitted plaintiff to file a response to the additional materials, which it did on July 1, 2013. The motion is fully submitted.

Procedural History

Plaintiff Community Voice Line, LLC (CVL), filed this case as a diversity action on May 15, 2012, against Great Lakes Communications Corporation (GLCC), an Iowa competitive local exchange carrier. CVL provides conference call services, recorded content, audio streams and other business services. It contends GLCC has failed to pay

commissions owed to CVL out of revenues GLCC collected from originating carriers for calls from CVL's customers to CVL's telephone numbers hosted by GLCC.

GLCC denies liability and asserts various affirmative defenses. It has also asserted a counterclaim against CVL and third-party claims against two other parties. Those claims are based, at least in part, on GLCC's allegation that certain agreements impose indemnification obligations on CVL and the third-party defendants.

CVL filed a motion to compel discovery and request for expenses (Doc. No. 44) on November 27, 2012, alleging that GLCC had been deficient in responding to various document requests served by CVL in August 2012. CVL included, as an exhibit to its motion, a letter from its counsel to GLCC's counsel dated November 8, 2012 (Doc. No. 44-10), itemizing the alleged deficiencies. GLCC resisted the motion.

I conducted a telephonic hearing on the motion to compel on January 10, 2013, and filed the discovery order (Doc. No. 64) the same day. The order included the following requirements:

a. On or before **January 25, 2013**, [GLCC] shall serve supplemental written responses to each of the document requests addressed in the November 8, 2012, letter (Doc. No. 44-10), except requests 35 and 37. For each request, the supplemental response shall state whether GLCC has responsive documents in its possession, custody or control. If so, the response shall describe the status of GLCC's production of those documents (for example, all such documents were previously produced or additional documents will be produced). If GLCC has no responsive documents in its possession, custody or control, the supplemental response shall expressly so state.

b. On or before **January 25, 2013**, GLCC shall produce any responsive documents in its possession, custody or control as to each of the document requests addressed in the November 8, 2012, letter (Doc. No. 44-10), except requests 35 and 37, to the extent GLCC has not previously produced those documents.

See Doc. No. 64 at 2. I denied CVL's request for expenses. *Id.*

The Present Dispute

CVL filed its motion for sanctions on April 17, 2013. It contends that GLCC has not complied with the January 10, 2013, order. CVL states that while GLCC did produce certain additional materials on January 25, 2013, serious deficiencies still exist with regard to two categories of documents: (1) financial documents necessary to calculate commissions and damages and (2) documents relating to GLCC's affirmative defenses and counterclaims. CVL also complains that with regard to documents GLCC did not produce, it did not affirmatively state that it has no such documents in its possession, custody or control. Instead, GLCC qualified its response by stating that it has produced all documents it had "located after a reasonable investigation."

At the hearing, CVL focused primarily on the first category of documents, presenting evidence and arguments concerning GLCC's alleged failure to produce all records necessary to verify and/or calculate the commissions allegedly owed to CVL. During their business relationship, GLCC provided CVL with reports summarizing the revenues GLCC received from various originating carriers for calls made to CVL numbers. Now that this dispute is in litigation, CVL seeks underlying data, such as bank statements, invoices from GLCC to the carriers and proof of payment to GLCC from the carriers. CVL identified various carriers for whom GLCC had yet to produce invoices, proof of payment or both. CVL further argued that with regard to certain "QuickReports" produced by GLCC, the information is provided only through part of the year 2012, not the entire year as requested. Finally, CVL highlighted examples of what it believes to be discrepancies or inaccuracies in the GLCC reports and argued that these alleged problems illustrate the importance of obtaining underlying records and financial data. Among the exhibits CVL submitted at the hearing was its Exhibit 2, a

spreadsheet listing GLCC's carriers and indicating, for each, whether GLCC had provided certain types of records.

GLCC's response during the hearing focused primarily on a suggestion that it was being "ambushed" and that the issues CVL raised during the hearing could have been resolved informally if CVL would have presented them to GLCC before the hearing. Based on those concerns, I directed GLCC's counsel to confer with his client after the hearing and submit a supplemental response in light of the information CVL presented during the hearing.

GLCC's supplemental response, filed June 19, 2013, is in the form of two declarations – one from its counsel and one from Josh Nelson, GLCC's owner. *See* Doc. Nos. 96 and 96-1. In his declaration, GLCC's counsel states that GLCC was supplementing its document production to include certain documents depicted as missing in CVL's Exhibit 2. He further states that the QuickReports contained information only through May 2012 because that is what he directed his client to provide. He also indicates that he produced various email and text messages on April 4, 2013, that he had previously withheld based on a belief that they were irrelevant.

Counsel further states that certain other documents do not exist. As for bank statements, he explains that he had never asked his client to provide them, even though CVL's document requests include them, because it was his understanding based on discussions with CVL's counsel that CVL did not actually seek bank statements. According to counsel, CVL is now changing its position. As such, he states, GLCC would be producing the bank statements to CVL.

Nelson's declaration basically mimics that of GLCC's counsel, particularly with regard to which of the missing documents exist, and were being produced, and which do not. He also confirms that GLCC's counsel never previously asked GLCC to provide copies of its bank statements. According to both declarations, if CVL would have

prepared and provided its summary of missing documents (Exhibit 2) to GLCC before filing its motion for sanctions, all issues could have been resolved informally.

In its response to the GLCC declarations, CVL takes issue with several statements. For example:

a. *QuickReports*: CVL again points out that its document requests sought this data through the entire year 2012, not just part of the year. CVL contends that GLCC intentionally limited the report parameters to only part of the year so the reports would not reflect all payments GLCC received from carriers with regard to CVL traffic.

b. *Bank statements*: CVL denies that it ever withdrew its request for bank statements and references meet-and-confer letters sent to GLCC's counsel in November 2012 and March 2013 as evidence that CVL continued to demand production of those statements.

c. *Exhibit 2*: CVL contends that it was under no obligation to prepare a "road map" for GLCC concerning the GLCC documents that had not yet been produced. Instead, CVL states, it was GLCC's obligation to comply with the January 10 order.

CVL states that GLCC produced another 156 pages of billing records after the June 6, 2013, hearing, and that the allegedly-irrelevant email and text messages that GLCC's counsel produced on April 4, 2013, include a relevant document that "will be damaging to GLCC." CVL suggests that these communications were withheld "for a reason."

Findings of Fact

Having reviewed all of the submissions of both parties, I make the following findings:

1. CVL's document requests, served in August 2012, encompassed the following categories of documents that are relevant to CVL's motion for sanctions:

- a. All documents evidencing or concerning agreements between GLCC and CVL from January 1, 2009, to the present. *See CVL Request Nos. 2, 3 and 4.*
- b. All invoices from GLCC to its long distance carriers from January 1, 2012, to the present. *See CVL Request No. 5*
- c. All documents showing payment or nonpayment of those invoices, including bank statements and other records. *See CVL Request No. 6.*
- d. All documents utilized by GLCC in the process of preparing those invoices. *See CVL Request No. 7.*
- e. All documents utilized by GLCC to determine payments due to CVL. *See CVL Request No. 8.*
- f. All communications between GLCC and CVL. *See CVL Request No. 15.*
- g. All communications between GLCC and third-parties concerning CVL. *See CVL Request No. 16.*
- h. All internal GLCC communications concerning CVL. *See CVL Request No. 17.*
- i. All documents supporting various affirmative defenses set out in GLCC's answer. *See CVL Request Nos. 20-32.*

2. On November 8, 2012, CVL's counsel wrote to GLCC's counsel and expressed concerns about GLCC's responses to thirty separate document requests (CVL's Request Numbers 1, 3-19, 22, 26-31 and 33-37). That letter is on file in this case as Document Number 44-10.

3. Based on dissatisfaction with GLCC's response to its letter, CVL filed its motion to compel discovery on November 27, 2012.

4. During the January 10, 2013, hearing on that motion, there was substantial uncertainty as to whether GLCC had produced all responsive documents in its possession. The uncertainty existed, in large part, because (a) GLCC had just produced additional documents and (b) GLCC's counsel had not asked GLCC if additional responsive documents existed with regard to any of the document requests at issue. CVL indicated during the hearing that it no longer had concerns about GLCC's responses to two requests (CVL's Request Numbers 35 and 37). However, CVL maintained that the status of GLCC's production of documents was either deficient or, at least, unclear, with regard to the other requests.

5. My order of January 10, 2013, required GLCC to serve supplemental written responses to each of the document requests addressed in the November 8, 2012, letter, except requests 35 and 37. Each supplemental response was to state whether GLCC has responsive documents in its possession, custody or control. If so, GLCC was to state whether all such documents were previously produced or, instead, if additional documents would be produced. If GLCC had no responsive documents in its possession, custody or control, the supplemental response was to expressly say that.

6. According to the January 10, 2013, order, the deadline for GLCC to serve supplemental responses, and to produce any additional, responsive documents, was January 25, 2013.

7. GLCC did not request an extension of the January 25, 2013, deadline.

8. GLCC violated the January 10, 2013, order in the following ways:

a. Instead of stating that it had no responsive documents in its possession, custody or control, GLCC qualified its supplemental responses by referring to "non-privileged documents" and stating that it had produced all such documents that it "has located after a reasonable investigation."

b. GLCC did not produce all of the required documents by January 25, 2013. Instead, GLCC has continued its practice of producing

documents intermittently. GLCC has produced additional documents on at least five occasions since January 25, 2013.

9. The documents GLCC produced after January 25, 2013, include billing records for five carriers, bank statements, QuickReports that now include data throughout the entire year of 2012, and additional communications. These are materials encompassed by CVL's document requests, and therefore the January 10, 2013, order.

10. GLCC has not established substantial justification for violating the January 10, 2013, order. The primary purpose of that order was to force GLCC to focus intensely on its own records, devote the time necessary to locate any remaining responsive documents and advise CVL as to whether additional documents existed.

11. With regard to bank statements, GLCC has not shown that CVL informally agreed to amend Request No. 6 to exclude those documents. Indeed, CVL has shown that it continued to request bank statements in its "meet and confer" correspondence. *See, e.g.*, Doc. No. 73-5 at ¶ 2.

12. While GLCC has made excuses based on its status as a small, family business, those excuses are not persuasive. If the image GLCC seeks to portray is accurate, then locating and producing information should be less difficult, not more. In any event, GLCC has been a party to several other cases in this court and is represented by experienced counsel. The size and/or nature of its business does not excuse it from compliance.

13. In light of the nature of this case, GLCC had a motive to move slowly and withhold information in order to create delay and frustrate CVL's efforts to calculate the amounts allegedly owed to it by GLCC.

14. GLCC has acted, at minimum, with deliberate indifference towards its discovery obligations – and particularly its obligation to comply with the January 10, 2013, discovery order.

15. CVL could have made resolution of the issues arising from GLCC's noncompliance more efficient by providing GLCC with the equivalent of CVL's Exhibit 2 at an earlier time.

Conclusions of Law

Parties to civil litigation have a duty to provide true, explicit, responsive, complete and candid answers to discovery. *See, e.g.*, Fed. R. Civ. P. 26(g); *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 609-10 (D. Neb. 2001) (citing *Dollar v. Long Mfg. N.C., Inc.*, 561 F.2d 613, 616 (5th Cir. 1977)). Counsel have a continuing duty to advise their clients of their duty to make honest, complete, non-evasive discovery disclosures, as well as the spectrum of sanctions they face for violating that duty. *Wagner*, 208 F.R.D. at 610. With regard to requests for the production of documents, a court may, when appropriate, order a party to verify that either (a) no responsive documents exist or, if they do exist, (b) they have all been produced. *Id.* (citing *In re Control Data Corp. Sec. Litig.*, No. 3-85-1241, 1988 WL 92085 at **6-7 (D. Minn. Feb. 22, 1988)).

Providing false or incomplete discovery responses violates the Federal Rules of Civil Procedure. *Id.* When a party violates an order compelling discovery, the court “may issue further just orders,” which may include:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A). In addition, or in the alternative, “the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C).

The court has discretion to determine the appropriate sanction for the violation of its discovery orders. *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 720 (8th Cir. 2010). Having found that GLCC violated the January 10, 2013, order, I conclude that two sanctions are appropriate under the circumstances:

a. ***Prohibition against offering evidence.*** CVL is entitled to defend itself, and prepare for trial, without wondering if GLCC will suddenly find additional documents, or if GLCC’s counsel will suddenly decide to produce documents that have been withheld. Pursuant to Rule 37(b)(2)(A)(ii), GLCC is hereby barred from using or offering into evidence any documents, records or data that it did not produce to CVL on or before **July 1, 2013**, *to the extent* that those materials are within the scope of CVL’s Document Request Numbers 1, 3 through 19, 22, 26 through 31, 33, 34 or 36. This

does not relieve GLCC from its continuing obligation to supplement its responses to discovery requests. In other words, if additional responsive documents exist, or are found, they must be produced to CVL. CVL, at its option, may elect to use those documents for any permissible purpose in this case. GLCC, however, may not.

b. ***Monetary Sanction.*** CVL is entitled to recover at least some portion of the expenses, including reasonable attorney fees, that it was forced to incur in obtaining this order. See Fed. R. Civ. P. 37(b)(2)(C). CVL may file a request for those fees and expenses on or before **July 20, 2013**. A failure to file the request by that date will constitute a waiver by CVL of any claim for fees and expenses. GLCC may file a response itemizing any objections to CVL's request within **ten (10) days** after CVL files the request. I will then consider the filings and determine the appropriate monetary sanction. While GLCC's filings indicate that its noncompliance may have been caused, in part, by its counsel of record, I will assess the sanction against GLCC, not its attorney.

In determining the amount of the sanction, I will take into account my finding that CVL likely could have reduced the cost of obtaining this order by providing GLCC with information akin to CVL's Exhibit 2 at some point prior to the June 6 hearing. I will also take into account the fact that CVL was represented by three attorneys during that hearing. While CVL was entitled to send as many attorneys as it saw fit, it is unlikely that I will charge GLCC for each attorney's time.

CVL requests additional sanctions, including the dismissal of GLCC's counterclaim. However, I conclude that the sanctions described above are sufficient to punish GLCC's conduct and remedy the resulting harm to CVL. Dismissal, in particular, is an extreme sanction. *Hunt v. City of Minneapolis*, 203 F.3d 524, 527 (8th Cir. 2000). I find that dismissal would be an inappropriate, and disproportionate, sanction based on the nature and extent of GLCC's violations.

Conclusion

CVL's motion for sanctions against GLCC (Doc. No. 73) is **granted**. GLCC is hereby sanctioned as described in this order. The amount of the monetary sanction, if any, will be established by separate order.

IT IS SO ORDERED.

DATED this 9th day of July, 2013.



LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE